Filed 9/30/02 Denise T. v Superior Court CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

DENISE T., Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Real Party in Interest.	C041744 (Super. Ct. No. J02605)

Denise T. (petitioner), the mother of J.Y. and S.Y. (the minors), seeks an extraordinary writ (Cal. Rules of Court, rule 39.1B) to vacate an order of the juvenile court denying reunification services and setting a permanency planning

hearing. (Welf. & Inst. Code, § 366.26.)[1] Petitioner also seeks a stay of the section 366.26 hearing. For reasons that follow, we shall deny the petition, rendering the request for a stay moot.

FACTS AND PROCEDURAL HISTORY

In November 2001, the minors, who were eight and 10 years old, were placed in protective custody and dependency petitions were filed after petitioner was arrested on charges of manufacturing methamphetamine. According to the allegations in the petition, which were subsequently sustained, petitioner was manufacturing methamphetamine in her home, and loaded firearms were found within reach of the minors. According to the petition, eight adults were living in the home, all of whom were arrested for operating a methamphetamine lab.

Petitioner did not attend the jurisdictional hearing, as she had allegedly "fled the state with her boyfriend" after learning she would be sentenced to five years in state prison. According to the dispositional report, petitioner "ha[d] a history of neglecting [the minors]," although prior interventions were either unsubstantiated or inconclusive. Petitioner had no prior convictions on her record. The minors were in good physical and mental health, and were performing at grade level in school. Maternal relatives had expressed willingness to care for them. Both minors stated they wanted to

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[1] Undesignated section references are to the Welfare and Institutions Code.

go home to petitioner. Nonetheless, the social worker recommended that reunification services be denied pursuant to section 361.5, subdivision (b)(1), as petitioner's whereabouts were unknown, and pursuant to section 361.5, subdivision (e), because petitioner had been sentenced to five years in state prison.

Petitioner was rearrested and the social worker confirmed her recommendation that petitioner not be provided reunification services "due to her incarceration." According to the social worker, "[t]he parent/child bonding between [petitioner] and [J.Y.] was not there." The social worker reported that J.Y. realized petitioner "will not be there for him" and he was "looking forward to being with his maternal aunt." On the other hand, S.Y. "appeared to have a lot of affection for [petitioner]" and had been asking to see her.

At the dispositional hearing, petitioner testified that she was scheduled to be released from prison in June 2005, which was her "half time date." According to petitioner, the minors had lived with her all their lives and, when they had visited her the preceding weekend, they both told her they wanted to come back to live with her. Petitioner testified that the minors love her. She confirmed that she had relatives who were willing to care for them. She testified that she voluntarily participated in a parenting course and "[s]ubstance abuse health" while in county jail and she wanted to reunify with the minors when she gets out of prison. Petitioner initially testified that she had not discussed adoption with the minors

but then stated she had "discussed everything" with them and they did not want to be adopted unless it was by a family member.

Following petitioner's testimony, the minors' attorney informed the court that the minors were not interested in being adopted and that he would be seeking guardianship on their behalf, with the possible exception of a relative adoption. He stated that there was "a strong relationship and bond" between petitioner and the minors but he did not want the minors "to be up in the air for three years."

Petitioner's attorney argued that the court had discretion to grant reunification services despite the fact that petitioner would be incarcerated "beyond the 18 months" and that, based on the minors' ages and their desire to return to petitioner's home, there was no reason why petitioner should not be offered an opportunity to reunify. He also asserted that petitioner wanted to designate the custodian for the minors and that her incarceration did not automatically preclude this.

The juvenile court denied reunification services to petitioner "[b]ased on the total circumstances here." The court ordered visitation a minimum of once a month, with authorization for additional visitation if it could be arranged.

DISCUSSION

Petitioner claims the juvenile court abused its discretion by not ordering reunification services. We disagree.

Section 361.5, subdivision (e)(1) delineates the circumstances under which reunification services are to be

provided to an incarcerated parent. That subdivision states, in pertinent part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, and any other appropriate factors. Reunification services are subject to the applicable time limitations imposed in subdivision (a)."

Petitioner argues that the statute does not permit services to be denied to an incarcerated parent solely because the parent's term of incarceration exceeds the maximum period for reunification. Petitioner relies on *In re Monica C.* (1995) 31 Cal.App.4th 296 as support for this position. In *In re Monica C.*, the Department of Social Services (DSS) argued on appeal that the failure to provide reasonable services to an incarcerated parent was immaterial because the mother would be incarcerated beyond the period for reunification, so the child could not be returned regardless of the services that were provided. (*Id.* at p. 308.) Rejecting this argument, the appellate court recognized that there are "limited avenues" to avoid losing a child for a parent who will be incarcerated

beyond the statutory reunification period. (*Ibid.*) These limited avenues involve "intermediate solutions which preserve some contact between parent and child," such as a parent's nomination of a guardian or placement with a relative. (*Id.* at p. 310.) The court "consider[ed]" that the goal of reunification is not restricted to a return of physical custody to the parent, but can "encompass[] the larger purpose of exploring ways of protecting the 'parents' interest in the companionship, care, custody and management of his children.'" (*Id.* at p. 309.) As the mother had nominated a prospective guardian whom DSS refused to investigate, the court found DSS "acted inconsistently with respect to its obligations to provide reunification services." (*Id.* at pp. 308, 310, quotation at p. 310.)

We agree with the reasoning in *In re Monica C.* that the fact that a parent's incarceration will exceed the applicable time limitations for reunification services will not in every case result in the parent's loss of his or her children. Section 361.5, subdivision (e) does not expressly prohibit a grant of services when the length of incarceration exceeds the reunification period. Instead, the statute focuses on detriment to the child and mandates the provision of services unless the court finds clear and convincing evidence that services will be detrimental. However, the statute *does* state that the "length of the sentence" must be considered in determining whether services will be detrimental and limits reunification services to "the applicable time limitations."

In the present matter, under the best of circumstances, petitioner was expected to be incarcerated for nearly three more years at the time of the dispositional hearing. Reunification services may be extended from 12 to 18 months only if it can be shown that the child can be returned and safely maintained in the parent's home within the extended time. (§ 361.5, subd. (a), 3rd par.) As it was anticipated that petitioner would still be in custody after 18 months, the 12-month limitation on services would have applied had services been granted. Thus, petitioner's length of incarceration exceeded the applicable reunification period by two years.

The lengthiness of petitioner's incarceration impacts the determination of whether services would be detrimental to the minors in this case. It is inevitable that a permanent plan will need to be determined for the minors, as petitioner will be incarcerated long after the applicable reunification period has run. An order for reunification services would only serve to forestall stability for the minors by delaying the implementation of a permanent plan.

The length of petitioner's incarceration also bears on another factor--the degree of detriment to the minors if services are not offered. Here, the record fails to reflect that the minors would derive any real benefit from the provision of services, and thus there is no detriment to the minors if services are not provided. There is no evidence in the record that an order for reunification services would give petitioner access to any more services in prison than she already has.

Statutes provide for continued visitation once a section 366.26 hearing has been set, and after the hearing has taken place, as long as parental rights are not terminated. (§§ 361.5, subd. (f), 366.26, subd. (c)(4).) If the minors' relationship with petitioner is sufficiently strong and beneficial, an exception to termination of parental rights exists to preserve that relationship. (§ 366.26, subd. (c)(1)(A).)

While some factors, such as the age of the minors and the degree of bonding they have with petitioner, do not indicate that services would be detrimental to them, other factors, such as the conflicting evidence regarding J.Y., who was of sufficient age to have his attitude toward reunification considered, support a finding that services would be detrimental. Furthermore, petitioner had not suggested a particular "custodian" for the minors, and relatives were being investigated for placement despite the denial of services. The juvenile court denied reunification services "[b]ased on the total circumstances." We find no abuse of discretion.

DISPOSITION

The petition is denied. The request for stay is denied as moot.

DAVIS, Acting P.J.

We concur:

RAYE, J.

KOLKEY, J.